

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 14, 2008

STATE OF TENNESSEE v. THOMAS E. CAPPS, SR.
Appeal from the Circuit Court for Hickman County
No. 04-5093CR R. E. Lee Davies, Judge

No. M2007-02085-CCA-R3-CD - Filed October 8, 2008

In August 2004 the Hickman County Grand Jury returned a six-count presentment charging the defendant, Thomas E. Capps, Sr., with one count of possession of a schedule II controlled substance (cocaine), two counts of sale of a schedule II controlled substance (cocaine), two counts of possession of a schedule IV controlled substance, and one count of possession of drug paraphernalia. The defendant pled guilty to one count of cocaine possession and one count of cocaine sale, both Class C felonies. Pursuant to the plea agreement, the defendant received two concurrent four-year sentences as a Range I, standard offender, the remaining charges were dismissed, and the defendant's manner of service was left to the trial court's discretion. Following a sentencing hearing, the trial court ordered that the defendant serve his sentences in the Department of Correction. On appeal, the defendant argues that the trial court erred in denying alternative sentencing. After reviewing the record, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. MCLIN, JJ., joined.

John P. Cauley, Franklin, Tennessee, for the appellant, Thomas E. Capps, Sr.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Kim R. Helper (on appeal) and Ronald L. Davis (at trial), District Attorneys General; Sean B. Duddy and Michael J. Fahey, II, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

At the July 17, 2007 sentencing hearing, Scott Jones, an agent with the Twenty-First Judicial District's Drug Task Force, testified that on February 9 and 13, 2004, he used a confidential informant to conduct two purchases of crack cocaine from the defendant at the defendant's residence. The informant wore a wire which allowed Agent Jones to hear conversations between the defendant and the informant; while the agent noted that there "wasn't a lot of conversation," he was able to hear conversation concerning cocaine, scales, and money, and the agent also heard someone counting money aloud. After the second purchase, Agent Jones obtained a search warrant for the defendant's

house. The search conducted pursuant to the warrant yielded crack cocaine, digital scales with crack cocaine residue on them, several crack pipes, police scanners, and approximately \$2000 in United States currency.

The trial court admitted the defendant's medical records at the hearing, and before the defendant testified, defense counsel summarized the defendant's medical conditions. According to the records, the defendant has been treated for illnesses including chronic obstructive pulmonary disease, coronary artery disease, anxiety, diabetes, hypertension, pneumonia, and chronic low back pain. At the time of the hearing, the defendant was on several medications, including Zocor, Glucotrol, Avandia, potassium chloride, Lasix, diltiazem, Protonix, aspirin, Xanax, albuterol, Atrovent, and Plavix. The defendant, upon questioning by the trial court, testified that he had difficulty breathing, and that his medical condition had worsened in the past two to three years. He said that two years prior to the hearing, he had 60% lung capacity; as of the hearing, he said that his lung capacity was down to 30%. He said that he had been breathing from an oxygen tank for the past four to five years. Originally, he was only connected to the oxygen tank at night, but as of the hearing, he had to breathe from an oxygen tank at all times.

On cross-examination, the defendant said that he was breathing from the oxygen tank at the time of the incidents leading to his arrest. He said that he takes ten to twelve different medications daily, and while he needs assistance taking the medications, he does not need a medical professional to dispense them. He said that he attends doctors' appointments once a month, with additional visits as needed. He said that as of the hearing, he lived at home and could eat solid food as long as it fit within his diet. Upon further questioning by the trial court, the defendant testified that he regretted selling cocaine and admitted that a certain individual, whom he would not name, came to his residence and supplied him with cocaine, which he then resold. When asked to name the supplier, the defendant refused, saying that he wanted to put his past behind him and that he did not "feel like I should put [any]body's name out like that." After the defendant continued to refuse to disclose the supplier's identity, the trial court ceased questioning.

Kim Capps, the defendant's wife, testified that she spends most of her time taking care of the defendant, whom she believed could not take care of himself and who spent most of his time seated in a chair or on a couch. She said that she gave the defendant his medications, checked his blood sugar, and assisted him in bathing, dressing, and using the restroom. She testified that taking care of the defendant was an exhausting enterprise, one that prevented her from having any employment. She testified that she maintained a separate residence from her husband, and after taking care of him during the day, she went to her own apartment at night to sleep.

On cross-examination, Mrs. Capps testified that she had been married to the defendant eight years at the time of the hearing and that he had been ill throughout the marriage. She said that the defendant had been on "around-the-clock" oxygen for the past three years. She noted that she was aware of her husband's past drug-related activities, and before the defendant's arrest she told him

that she would leave him if he did not give up his lifestyle. Mrs. Capps said that she had been arrested for drug-related activities in her “past life.” When asked if she was arrested at the same time her husband was arrested, she initially said that she was not present at the time, but she ultimately admitted that she was arrested along with her husband, although the charges against her were later dismissed. She also testified that while she maintained a separate residence from her husband, the defendant was never left alone at night. Mrs. Capps said that she usually spent her nights with the defendant, and if she did not stay with him, the defendant’s daughter or grandson took care of him.

Teresa Ritchie, the defendant’s daughter, testified that she helped care for the defendant when the defendant’s wife was not with him. She said that her sons also helped take care of him. Ms. Ritchie said that while her father’s residence was formerly frequented by “people . . . [who] you didn’t feel comfortable around,” she now felt safe visiting with her father. On cross-examination, she admitted that some of the people who formerly visited the defendant were criminals and drug users. She also said that while she helped take care of her father, she did not stay overnight with him when his wife was not present. Rather, Ms. Ritchie said her children stayed with the defendant.

At the conclusion of the hearing, the trial court ordered that the defendant serve his four-year sentence in incarceration. This appeal followed.

ANALYSIS

Initially, we note that the state argues that the defendant has waived appellate review of the trial court’s decision because his notice of appeal, which was filed on September 10, 2007, was not timely filed. Generally, the notice of appeal must be “filed and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from.” Tenn. R. App. P. 4(a). The uniform judgment documents in this case list the “Date of Entry of Judgment” as July 17, 2007. However, the “file-stamp” dates on the documents reflect that the documents were not filed with the circuit court clerk until August 14, 2007. In a related case, this court held that the “date the order of sentence is entered” for purposes of a defendant’s filing a motion for new trial pursuant to Tennessee Rule of Criminal Procedure 33(b) is “the date of its filing with the court clerk after being signed by the judge.” *State v. Kirby Stephens*, ___ S.W.3d ___, No. M2006-02521-CCA-R3-CD, 2007 WL 2744999, at *8 (Tenn. Crim. App. Sept. 21, 2007) (approved for publication). Applying this standard to Rule 4(a), we conclude that the “date of entry of the judgment appealed from” in this case was August 14, 2007. As such, the defendant’s notice of appeal was timely filed, and we will consider this appeal on its merits.

Alternative Sentencing

The defendant’s sole issue on appeal is that the trial court erred by denying his request for alternative sentencing and ordering that he serve his sentences in the Department of Correction. The

defendant argues that the trial court should have granted his request for alternative sentencing based on his poor health. We disagree.

An appellate court's review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2003). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229, 236-37 (Tenn. 1986).

The defendant was convicted of two Class C felonies and sentenced as a standard offender; thus, he was "presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6) (2003). However, this presumption does not entitle an offender who meets this standard to relief; rather, sentencing issues must be determined by the facts and circumstances presented in each case. See State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing Moss, 727 S.W.2d at 235). Even if a defendant is presumed to be a favorable candidate for alternative sentencing, the statutory presumption may be overcome if (1) confinement is needed to protect society by restraining a defendant who has a long history of criminal conduct, (2) confinement is needed to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses, or (3) less restrictive measures than confinement have frequently or recently been applied unsuccessfully to the defendant. Ashby, 823 S.W.2d at 169 (citing Tenn. Code Ann. § 40-35-103(1)(A)-(C)). A trial court should also consider a defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. Tenn. Code Ann. § 40-35-103(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). Ultimately, in sentencing a defendant, a trial court should impose a sentence that is "no greater than that deserved for the offense committed" and is "the least severe measure necessary to achieve the purposes for which the sentence is imposed." Id. § -103(2), (4).

In ordering the defendant to serve his sentences in the penitentiary, the trial court noted that the defendant had a record consisting of several convictions for drug offenses since 1993.¹ In 1993, the defendant was convicted of possession of cocaine and sentenced to eight years probation. In 1995, while on probation for the earlier offense, the defendant was convicted of misdemeanor drug possession. In 2003, the defendant was convicted of two counts of misdemeanor drug possession; while on probation for these convictions, the defendant committed the offenses which are the subject of this appeal. As the trial court noted at the sentencing hearing, the defendant's criminal record also indicates that the defendant has failed at earlier attempts at alternative sentencing.

The defendant argues that the trial court should have imposed alternative sentencing based on his poor health. However, as the trial court noted at the sentencing hearing, the defendant committed these offenses while he was suffering from his various illnesses—and, presumably (based on the time frame given by the defendant's wife), while he was breathing from an oxygen tank on a continuous basis. As such, we conclude that the trial court committed no error in ordering the defendant to serve his sentences in the penitentiary.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

D. KELLY THOMAS, JR., JUDGE

¹The defendant has a lengthy history of convictions for various offenses spanning over forty-five years. However, the parties stipulated that only those convictions dating from 1993 would be considered by the trial court in its sentencing determination.